United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/ affidavit of mailing

75-7098

To be argued by
GEORGE H. WELLER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7098

B P/S

DEVLIN ADAMS, by ROSSINI ADAMS
his parent and natural guardian,
Plaintiff-Appellant,

—against—

CASPAR WEINBERGER, Secretary of
Health, Education, and Welfare,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

In this Social Security child's insurance benefit case, by Decision and Order dated November 25, 1974, the United States District Court for the Eastern District of New York (Travia, *J.*), granted the defendant Secretary's motion for judgment on the pleadings and denied the plaintiff child's motion for summary judgment.

Plaintiff child had brought this action for a judicial review of defendant Secretary's denial of dependent child's benefits, alleging that the statute, 42 U.S.C. § 416(h)(3)(C)(ii), is unconstitutional because to show dependency, some illegitimate children must show that at the time of their father's death their fathers were living with them or contributing to their support; whereas, other illegitimate

children can qualify under different provisions of the law without proving that their fathers were living with them or contributing to their support at the time of their father's death, and legitimate children need only show paternity.

The Court held that there was substantial evidence to support the Secretary's conclusion that the father was not living with or contributing to the support of his unborn child at the time of the father's death.

The Court also held that the statute was "reasonably related to the prevention of spurious claims inasmuch as these provisions seek to insure dependence which presumably exists in the case of legitimate children and illegitimate children whose paternity has been acknowledged, decreed by a court or whose parents have been ordered by a court to contribute to the children's support. As a result, the statute's classification is rationally related to the legitimate governmental interest in avoiding spurious claims and is therefore constitutional."

Judgment was entered in favor of the defendant and against the plaintiff on November 26, 1974.

From this judgment, plaintiff took this appeal.

Statement of Facts

Plaintiff Devlin Adams was born on March 8, 1970 (Tr. 85),[1] less than a month after his father's February 18, 1970 murder (Tr. 83). Devlin Adams' mother applied on

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[1] "Tr" refers to the transcript of proceedings before the Social Security Administration, filed as an exhibit to the appendix. F.R.A.P. 30(e).

August 5, 1970 to the Social Security Administration for child's insurance benefits for her son but her application was denied at each stage of the administrative proceedings (Tr. 75, 77-81, 11-17, 3).

The Secretary of the Department of Health, Education, and Welfare was satisfied that the deceased insured individual was the biological father of Devlin Adams (Tr. 16). The application was denied, however, because the Secretary found that Devlin Adams was not deemed a dependent child under the law (Tr. 16), nor had he shown that his father was living with him or contributing to his support at the time of the father's death (Tr. 16).

Plaintiff brought this action on May 3, 1973 in the United States District Court for the Eastern District of New York under 42 U.S.C. § 405(g) for a judicial review of the final decision of the Secretary (A3-A6).[2]

Defendant Secretary moved for judgment on the pleadings (A13-A16) and plaintiff Devlin Adams moved for summary judgment (A10-A12).

By Decision and Order dated November 25, 1974, (A13-A28), the Court found that Devlin Adams' father was not living with Devlin Adams at the time of the father's death because the father and mother had separated due to their incompatibility, and at the time of the father's death they had not decided whether or not they would be together in the future (A22-A23). The Court found that the support given by the father was not regular or continuous or of the level to justify a finding that Devlin Adams' father was contributing to the support of his unborn child (A23).

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[2] "A" refers to the appendix.

The Court also found that 42 U.S.C. § 416(h)(3)(C)(ii) is constitutional as the statute's classification of illegitimates is rationally related to a legitimate governmental interest in avoiding spurious claims (A22-A28).

Judgment was entered on November 26, 1974 in favor of the defendant Secretary and against plaintiff.

Notice of Appeal was filed by plaintiff on December 20, 1974 (A29).

ARGUMENT

POINT I

The District Court properly determined that there was substantial evidence to support the finding of the Secretary that plaintiff's father was not living with plaintiff or contributing to his support at the time of the father's death.

(1)

The Social Security Act is remedial and is to be construed broadly and applied liberally. *E.g. Gold* v. *Secretary of Health, Education, and Welfare*, 463 F.2d 38, 41 (2d Cir. 1972), but the burden of proof is on the applicant. Cf. *Gold, supra*, at 41; *Kerner* v. *Flemming*, 283 F.2d 916, 922 (2d Cir. 1960).

The Secretary's findings are conclusive as to any fact if supported by substantial evidence. 42 U.S.C. § 405(g). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Company of New York* v. *N.L.R.B.*, 305 U.S. 197, 229 (1938).

Under the substantial evidence test the Court must affirm the Secretary's finding even though the Court might have reached a different conclusion if the case was before the Court *de novo*. *Mullen* v. *Gardner*, 256 F. Supp. 588 (E.D.N.Y. 1966).

(2)

Plaintiff Devlin Adams was born after his father's death, but he would be eligible for dependent child's benefits after his birth if he had been born into a household in which his father was living or contributing to the support of at the time of the father's death. *Wagner* v. *Finch*, 413 F.2d 267 (5th Cir. 1969; and *Moreno* v. *Richardson*, 484 F.2d 899, 904 n. 5 (9th Cir. 1973). Social Security Ruling 68-22 states:

> "Where the deceased insured worker, at the time of his death, was living with and contributing to the support of the mother of his unborn illegitimate child, held, the worker's contributions to the support of the child's mother and his living with the mother constitute contributions to the support of, and living with, the unborn child within the meaning of section 216(h)(3)(C)(ii) of the Act [42 U.S.C. § 416(h)(3)(C)(ii)], provided that the child was born alive."

(3)

Courts which have interpreted the "living with" requirement of the law have consistently held that the father must be living with his child at the time of the father's death, and not have intentionally elected to discontinue living with his child. *Madison* v. *Richardson*, 354 F. Supp. 383, 387, 388 (M.D.La. 1973); *Bridges* v. *Finch*, Civil Action No. 69-C-1327 (E.D.N.Y., filed Nov. 26, 1971) (slip op. pg. 6); *Wagner* v. *Finch*, 413 F.2d 267, 268 (5th Cir. 1969); and *Jordan* v. *Finch*, Civil Action No. 32-69 (D.N.J., filed, Jan. 27, 1970) (slip op. pg. 6).

However, if the father had been living with the child, but by circumstances beyond the father's control had been unable to live with the child at the time of the father's death, then the courts have found that the "living with" requirement had been satisfied. *Madison* v. *Richardson*, 354 F. Supp. 383 (M.D.La. 1973) (mental disability); *Crisp* v. *Richardson*, CCH Unemployment Reporter ¶ 16,612 (W.D.N.C., filed Feb. 9, 1972) (prison); and *Bridges* v. *Finch*, Civil Action No. 69-C-1327 (E.D.N.Y., filed Nov. 26, 1971) (illness). *See, also, Schmiegigen* v. *Celebrezze*, 245 F. Supp. 825 (D.D.C. 1965) (wife's mental incompetency).

"Living with" is defined in the Social Security Regulations as follows:

> "20 C.F.R. § 404.1113
>
> (a) . . . 'Living with' as used in sections . . . 416(h)(3) . . . mean the parent and child are sharing the same residence and that the parent is exercising or has the right to exercise parental control and authority over the child. As used in this section, the term 'parent' includes a natural parent . . .
>
> (b) . . . A child and parent will be considered to be sharing the same residence during a periodic or temporary separation if the circumstances indicated that the child and parent have shared and again expect to share a common residence when conditions permit; . . . However, a child is not considered to be 'living with' his parent . . . in situations where the parent does not have the right to exercise parental control and authority over the child; . . ."

Devlin Adams' mother began to live with his natural father in early or middle 1969 (Tr. 87, 94, 28, 40, 42, 43, 50, 99), in an upstairs efficiency apartment over his business (Tr. 28), with the father going home weekends to see his wife and children (Tr. 29, 67).

Once in a while Devlin Adams' mother would go home to her mother's house in Brooklyn (Tr. 30, 87). But one month before Devlin Adams was born, his mother and natural father broke up completely (Tr. 31, 87, 99, 103), the mother going to her own mother's home (Tr. 87, 99). Devlin Adams' mother said she just stopped living with the natural father (Tr. 31), with no intention to return to the natural father's apartment (Tr. 36), and she did not know if she intended to reestablish a relationship with the natural father (Tr. 31, 36, 103). She did leave some personal effects in the apartment when she departed (Tr. 36, 103). During their "personal conference" before the break up, Devlin Adams' natural father said to the mother that if she didn't want the child, "to give it to him", but she replied "that's not what I want; I want my baby" (Tr. 31).

Devlin Adams' mother left his natural father because she did not like his class of friends; they aggravated her (Tr. 39). She stayed depressed all the time (Tr. 31). She couldn't ask him to give up his friends for her (Tr. 39).

On September 7, 1971, Devlin Adams' mother made a statement as to her separation from Devlin Adams' natural father:

> "The question was up in the air at the time of his death. However, I'm almost positive that we would have resumed living together, especially considering the birth of the child" (Tr. 103).

In her earlier July 13, 1971 statement, Devlin Adams' mother made no mention of resuming living together after the breakup (Tr. 99-101). Nor did Devlin Adams' mother in her statement of August 5, 1970 make any mention of resuming living together after the breakup (Tr. 87-88). And, during her testimony before the Administrative Law Judge on September 25, 1972, Devlin Adams' mother was uncertain as to her again living together with his natural father (Tr. 31, 36).

The District Court concluded that there was substantial evidence to support the Secretary's finding of fact that Devlin Adams' father was not living with him at the time of the father's death. The Court said (A6-7):

> "In the instant case, the wage earner's separation from the pregnant claimant was not caused by forces beyond his control . . . [T]he wage earner lived with the claimant until one month before his death. The claimant's decision to leave their joint abode was reached after a discussion with the wage earner and was predicated upon the fact that she was depressed, did not like his class of friends and was pregnant. Moreover, at the time of the wage earner's death, no decision had been reached as to whether the wage earner and the claimant would start living together again in the future. Therefore, it cannot be said that the wage earner's separation from the claimant was caused by forces beyond his control. Rather, the separation was apparently precipitated by the wage earner and the claimant's incompatibility. A separation based upon incompatibility cannot be analogized to a separation based upon illness or imprisonment for the latter two circumstances truly are forces beyond the wage earner's control."

(4)

Congress never intended that there be a particular dollar amount of "support". *Wagner* v. *Finch,* 413 F.2d 267, 268 (5th Cir. 1969). The cases which have been concerned with support have interpreted "support" being satisfied if it is regular and continuous with contributions to be best of the wage earner's ability. *Dean* v. *Richardson,* CCH Unemployment Reporter ¶ 16,767 (S.D.W.Va., filed July 3, 1972); *Crisp* v. *Richardson,* CCH Unemployment Reporter ¶ 16,612 (W.D.N.C. filed Feb. 9, 1972); and *Mobley* v. *Richardson,* CCH Unemployment Reporter ¶ 16,439 (W.D.N.C., filed Sept. 8, 1971). *See, also, Bridges* v.

Finch, Civil Action No. 69-C-1327 (E.D.N.Y., filed Nov. 26, 1971) (slip. op. pg. 14). If the support had been regular and continuous to the best of the wage earner's ability but had ceased for some unavoidable reason, the courts have found the requirement for "support" satisfied. *Dean* v. *Richardson, supra* (unemployment and sickness); *Crisp* v. *Richardson, supra* (imprisonment); *Bridges* v. *Finch, supra* (failing health); and *Mobley* v. *Richardson, supra* (hospitalization).

"Support" and "contributions" are defined in the Social Security regulations as follows:

> "The term 'support' includes food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items for maintenance of the person supported." 20 CFR § 404.350(c).
>
> " 'Contributions' . . . means contributions actually provided by the contributor from his own property, or the use thereof, or by the use of his own credit . . . " 20 CFR § 404.350(d).

If Devlin Adams' mother needed some money she would go to his father and get it in cash (Tr. 33), or the father would come and give the mother $25 or $30 or ask her if she wanted money (Tr. 33).

Over the first seven months of Devlin Adams' mother's pregnancy, the natural father gave the mother $200-$300 in cash, including the $100 down payment for the hospital (Tr. 34). The father said that the hospital bills would be around $1,000 but the mother was not to worry about it (Tr. 32); he would take care of the arrangements (Tr. 52).

The natural father wanted the mother to stop working at her regular job during the latter part of her pregnancy, but, if she wanted something to do, she could do some of his book work (Tr. 54, 55).

In her personal statement of August 5, 1970, Devlin Adams' mother said that from June 1969 to January 1970 the father had "always supported me. He gave me money when I needed it. He did not give my money on a regular payment basis. He gave it to me as I needed it . . . During the times I was living with my mother he would give me money if I needed any. I had saved some money so did not need to ask him for any during the time before his death that we were separated. . . . He had planned to pay for my hospital stay and to provide for us once the baby was born . . . " (Tr. 87-88).

The natural father's father in his August 31, 1970 personal statement stated, "Mrs. Adams told me she had taken out a small loan to help support the child . . . " (Tr. 89).

In her personal statement of July 13, 1971, Devlin Adams' mother stated:

> "During the brief periods of time between 2/69 and 2/70 that Mr. McGinn [the father] and I were separated Mr. McGinn gave me any money I needed personally, rather than sending it by mail, since we saw each other all the time . . . "(Tr. 99).
>
> "Mr. McGinn never signed any papers stating he would pay for any of the expenses incurred through the birth of our child. He made verbal commitments to pay the expenses" (Tr. 100).

In her statement of September 1, 1971, Devlin Adams' mother stated:

> "5. Mr. McGinn made cash payments to me toward my general support and medical bills both during the period we lived together and after our separation. All payments were made by Mr. McGinn to me in cash. I have no receipts or other documentation of these payments. I would have been unable

> to pay all of the medical expenses I incurred during the period without Mr. McGinn's assistance."

In an April 21, 1971 prepared affidavit, Devlin Adams' mother said of the father of her child:

> ". . . he stated openly and freely his intention to care for the child and to provide it financial support . . . he paid the rent . . . he also contributed financially to deponent's living costs and to her medical expenses connected with the birth of his son . . . " (Tr. 94).

Devlin Adams' natural father's father's April 30, 1971 affidavit says:

> "His son . . . was planning to care for, support . . . his as yet unborn child . . . "(Tr. 96).

Devlin Adams' natural father's father later disavowed this affidavit (Tr. 98, 40-42).

The District Court concluded that there was substantial evidence to support the Secretary's finding of fact that Devlin Adam's father was not contributing to his support at the time of the father's death. The Court said (A7):

> "Here, the wage earner never contributed to the claimant's support on a regular basis. Stated differently, the wage earner's contributions consisted of sporadic cash payments, totalling $200.00-$300.00, and a payment of $100.00 to be used as a down payment on the hospital fee. In sum, a somewhat more adequate level of support than has been shown here is

required before a finding of support can be made on the basis of the judicial construction of the statute." [3]

(5)

After a careful analysis of the cases and the transcript, the District Court concluded that the findings of the Secretary are supported by substantial evidence: That is, the findings of the Secretary that Devlin Adams' natural father was not living with him or contributing to his support at the time of the father's death is such as a reasonable mind might accept as adequate to support the Secretary's conclusion.

POINT II

The purpose of the child's insurance program in the Social Security system is to provide benefits to dependent children, and it is constitutional to require certain children who are less likely to be dependent to show their dependency.

(1)

The Social Security Child's Insurance Benefits program is to provide support for dependent children. *See, Jiminez* v. *Weinberger*, 417 U.S. 628, 634 (1974).

In 42 U.S.C. § 402(d)(1), Congress sets out the dependency qualification for Child's insurance benefits:

---

[3] The Court specifically rejected the Administrative Law Judge's requirement that the support must also be substantial (A7 n.4). The Court noted that "the reviewing court is not bound to accept the Secretary's conclusions of law. *See, e.g., Gooding* v. *Richardson*, 339 F. Supp. 295, 300 (E.D. Mo. 1972)" (A5).

> "Every child . . . of an individual who dies a fully or currently insured individual,[4] if such child— . . .
>
> (C) was dependent upon such individual— . . .
>
> (ii) if such individual has died,[5] at the time of such death . . .
>
> shall be entitled to a child's insurance benefit . . ."

In 42 U.S.C. § 402(d)(3), Congress reemphasizes this dependency requirement, then states that dependency is demonstrated by the deceased father having lived with or contributed to the support of the child:[6]

> "A child shall be deemed dependent upon his father or adopting father unless . . . [at the time of death], such individual was not living with or contributing to the support of such child . . .".[7]

However, in the same statute, Congress establishes a conclusive presumption that a legitimate or adopted child is dependent upon his father. This presumption eliminates the need for a legitimate child or adopted child to prove that his father was living with him or contributing to his support at the time of the father's death. The statute states:

> "A child shall be deemed dependent upon his father unless, . . . [at the time of death], such individual was not living with or contributing to the support of such child and—

---

[4] There is no question that plaintiff's biological father was both fully and currently insured under the Social Security system. (Tr. 82).

[5] Discussion in this case is limited to deceased wage earners.

[6] There is no question that plaintiff Devlin Adams meets the age, filing, and marital requirements of the law so they will not be discussed further.

[7] The law also uses "mother or adopted mother". "Father" is used in this brief as pertinent to the facts of this case.

> (A) such child is neither the legitimate nor adopted child of such individual . . ."

42 U.S.C. § 402(d)(3)(A).

The same statute also legitimatizes certain illegitimate children for child's insurance benefit purposes so that they do not have to prove dependency. The statute states:

> "For purposes of this paragraph [42 U.S.C. § 402(d)(3)], a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual." 42 U.S.C. § 402(d)(3).

Section 416(h)(2)(B) of Title 42 U.S. Code defines the following as a "child", which means that under the provisions of 42 U.S.C. § 402(d)(3) the child is deemed legitimate and does not have to prove dependency:

> An applicant whose mother and father went through a wedding ceremony which except for a legal impediment not known at the time would have been valid.

Section 416(h)(3) of title 42 U.S. Code defines each of the following as a "child", which means that under the provisions of 42 U.S.C. § 402(d)(3) the child is deemed legitimate and does not have to prove dependency:

> An applicant whose father had acknowledged in writing that the applicant is his son.[8] 42 U.S.C. § 416(h)(3)(C)(i)(I).

---

[8] The law refers to "son or daughter" but "son" is used in this brief as pertinent to the facts in this case.

> An applicant whose father had been decreed by a court to be the father. 42 U.S.C. § 416(h)(3)(C)(i)(II).
>
> An applicant whose father had been ordered by a court to contribute to the support of the applicant because the applicant is his son. 42 U.S.C. § 416(h)(3)(C)(i)(III).

Section 416(h)(3) of title 42 U.S. Code also defines the following as a "child", which means that under the provisions of 42 U.S.C. § 402(d)(3) the child is deemed legitimate, but by the terms of this subparagraph the child has to prove dependency:

> An applicant whose father is shown to be a deceased insured individual who at the time of his death was living with or contributing to the support of the applicant. 42 U.S.C. § 416(h)(3)(C)(ii).

Additionally, if an applicant for child's insurance benefits would take as a child from his deceased father under state law of the father's domicile relative to the devolution of intestate personal property, the applicant is deemed a "child" under 42 U.S.C. § 402(d)(3) and is "deemed . . . dependent" upon his father unless the father was not living with or contributing to his support at the time of the father's death. 42 U.S.C. § 402(d)(1), and 42 U.S.C. § 416(h)(2)(A).[9]

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[9] This interpretation was used by Judge Travia in this *Adams* case and by the majority in *Norton* v. *Weinberger*, Civil 72-271-B (D. Md., filed Feb. 28, 1975) (3 judge ct.). *See, also, Bridges* v. *Finch*, Civil Action No. 69-C-1327 (E.D.N.Y., filed Nov. 26, 1971); and *Ray* v. *Social Security Board*, 73 F. Supp. 58 (S.D. Alabama 1947).

This interpretation was specifically rejected by the dissenting judge in *Norton, supra*. Other courts have accepted that a child who would inherit from his father under applicable state intestacy

[Footnote continued on following page]

law is deemed "legitimate" under 42 U.S.C. § 402(d)(3) and therefore "deemed dependent". [There is some question in these cases as to whether the question was before the court and therefore "investigated with care and considered in its full extent." *Communications Workers of America, AFL-CIO et al* v. *American Telephone and Telegraph Company, Long Lines Department*, — F.2d — (2d Cir. 1975) (slip op. pp. 2549, 2556, filed March 26, 1975)]. E.g., *Jiminez* v. *Weinberger*, 417 U.S. 628 (1974) (dicta); *Lucas* v. *Secretary*, Civil No. 4845 (D.R.I., filed Feb. 25, 1975); *Moreno* v. *Richardson*, 484 F.2d 899 (9th Cir. 1973); *Severence* v. *Weinberger*, 362 F. Supp. 1348 (D.D.C. 1973); *Beaty* v. *Weinberger*, 478 F.2d 300 (5th Cir. 1973); and *Griffin* v. *Richardson*, 346 F. Supp. 1226 (D. Md. 1972) (3 judge ct.), *aff'd*, 409 U.S. 1069 (1972). *See, Polotti* v. *Flemming*, 277 F.2d 864 (2d Cir. 1960).

As 42 U.S.C. § 402(d)(3) refers specifically to "section 416(h)(2)(B) or 416(h)(3)" while making no reference to section 416(h)(2)(A), it follows that Congress was not legitimazing and therefore deeming dependent those children who would take intestate personal property.

When 42 U.S.C. § 416(h)(3) was added to the Social Security Act in 1965, Sec. 339 of P.L. 89-97, the section was labelled "QUALIFICATION OF CHILDREN NOT QUALIFIED UNDER STATE LAW", S. Rept. No. 414, 89th Cong. 1st Sess. (1965) as quoted in 1965 U.S. Code Congressional and Administrative News ("1965 USCCAN") stated:

"The bill provides that a child be paid benefits based on his father's earnings without regard to whether he has the status of a child under State inheritance laws if the father was supporting the child or had a legal obligation to do so. Under present law, whether a child meets the definition for the purpose of getting child's insurance benefits based on his father's earnings depends on the laws applied in determining the devolution of intestate personal property in the State in which the worker is domiciled. . ." 1965 USCCAN 1958.

"Under present law, whether a child meets the definition of a child for the purpose of getting child's insurance benefits based on his father's earnings depends on the laws applied in determining the devolution of intestate personal property in the State in which the worker is domiciled. . ."

"The committee believes that in a national program that is intended to pay benefits to replace the support lost by a child

[Footnote continued on following page]

In fact, therefore, two groups of applicants do not come within the conclusive presumption of the law as to dependency and are required to show that at the time of his death, the deceased father was living with the applicant or contributing to the support of the applicant.

One group consists of those illegitimate applicants who do not qualify under the wedding ceremony, written acknowledgment, or court order exceptions, but who would take intestate personal property. The other group consists of those illegitimate applicants who do not qualify under the wedding ceremony, written acknowledgment, court order, or intestate devolution exceptions. It is to this group that plaintiff-appellant Devlin Adams belongs.

Plaintiff Adams alleges that 42 U.S.C. § 416(h)(3)(C)(ii) is unconstitutional because it requires him, an illegitimate child, to show that his deceased father was living with or contributing to his support at the time of his death, but does not require this of a legitimate child.

(2)

There is no "fundamental right" involved in this case, of course, as there is no fundamental right to Social Security benefits. *Richardson* v. *Belcher,* 404 U.S. 78, 80-81 (1971); and *Flemming* v. *Nestor,* 363 U.S. 603, 610-611 (1960). Moreover, this case does not involve a "suspect" classification. A majority of the Supreme Court has stead-

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when his father retires, dies, or becomes disabled, whether a child gets benefits should not depend on whether he can inherit his father's intestate personal property under the laws of the State in which his father happens to live. The committee has therefore included in the bill a provision under which benefits would be paid to a child on the earnings record of his father, even though the child cannot inherit the father's intestate property. . ." 1965 USCCAN 2050.

See, Krause: Equal Protection for the Illegitimate, 65 Mich. L. Rev. 477, 481 (1967).

fastly avoided designating illegitimacy as a suspect classification, although there have been numerous opportunities for them to do so.[10]

When there is no suspect classification or fundamental right involved, the Supreme Court has upheld a classification if it bears a rational relationship to a legitimate state interest. E.g. *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974). *See,* Nowak: Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications. 62 Geo. L. J. 1071, 1073 (1974). C.f. *Noel* v. *Chapman,* — F.2d — (2d Cir. 1975) (filed, Jan. 3, 1975) (slip. op. pg. 1135); and *Bynes* v. *Toll,* — F.2d — (2d Cir. 1975) (filed, Feb. 6, 1975) (slip op. pg. 1679). However, this rational basis test varies with the nature of what is involved in the classification. If the classification relates only to the regulation of commercial activities or taxation, the Court has upheld the classification if any basis can be conceived of upon which the classification could rationally rest. E.g. *McGowan* v. *Maryland,* 366 U.S. 425 (1961); 62 Geo. L.J. 1071 at 1073, and 1073 n.11. If the classification does not involve commercial activities or taxation, then the rational relationship test standard varies. 62 Geo. L.J. 1071 at 1073. Three careful com-

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[10] *Jiminez* v. *Weinberger,* 417 U.S. 628 (1974); *New Jersey Welfare Rights Organization* v. *Cahill,* 411 U.S. 619 (1973) (per curiam); *Gomez* v. *Perez,* 409 U.S. 535 (1973) (per curiam); *Weber* v. *Aetna Casualty and Surety Co.,* 406 U.S. 164 (1972); *Labine* v. *Vincent,* 401 U.S. 532 (1971); *Glona* v. *American Guarantee & Liability Insurance Co. et al,* 391 U.S. 73 (1968); *Levy* v. *Louisiana,* 391 U.S. 68 (1968); *Beaty* v. *Weinberger,* 478 F.2d 300 (5th Cir. 1973), *aff'd mem* 418 U.S. ..... (1974), 94 S. Ct. 3190; *Norton* v. *Weinberger,* 364 F. Supp. 1117 (D. Md. 1973) (3 judge court), *vacated and remanded,* 418 U.S. ..... (1974), 94 S. Ct. 3191; *Griffin* v. *Richardson,* 346 F. Supp. 1276 (D. Md. 1972) (3 judge court), *aff'd mem,* 409 U.S. 1069 (1973); and, *Davis* v. *Richardson,* 342 F. Supp. 588 (D. Conn. 1972) (3 judge court), *aff'd mem,* 409 U.S. 1069 (1972).

mentators have come to a conclusion that this middle ground is a balance between the suspectness of the classification and the state's interests, Kwaswick: A Question of Balance: Statutory Classifications Under the Equal Protection Clause, 26 Stan. L. Rev. 155, 166 (1973); or a requirement that the legislative means must substantiate further legislative ends, Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection, 86 Harv. L. Rev. 1, 20 (1972); or that the classification is a demonstrated rational means of advancing a state interest and capable of withstanding analysis. 62 Geo. L. Rev. 1071 at 1081.

In these academic analyses the authors demonstrate that the Supreme Court in a middle ground approach uses the following type of analysis:

1. What is the purpose of the legislation?
2. Does the classification rationally advance this purpose?
3. Can the classification be justified as a means of rationally advancing this purpose?

An analysis of 42 U.S.C. § 416(h)(3)(C)(ii) shows that it meets the Supreme Court's standard and is constitutional.[11]

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[11] In a very recent case on the question as to whether there was a violation of the Due Process Clause of the Fifth Amendment, the Supreme Court said, "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment. See, *e.g.*, *Schlesinger* v. *Ballard*, — U.S. — (1975); *Jiminez* v. *Weinberger*, 417 U.S. 628, 637 (1974); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973)." *Weinberger* v. *Wiesenfeld*, — U.S. — (1975), — S. Ct. —, 43 L.W. 4393, 4394 n. 2. (U.S. Mar. 19, 1975)

(3)

The overall purpose of the Social Security child's insurance benefits program is to provide support for the child dependents of a deceased wage earner. *See, Jiminez* v. *Weinberger,* 417 U.S. 628, 634 (1974); *Watts* v. *Veneman,* 476 F.2d 529, 533 (D.C. Cir. 1973); *Norton* v. *Weinberger,* Civil 72-271-B (D. Md., filed Feb. 28, 1975) (3 judge ct.) (slip op. pp. 4 & 8, and slip op. (dissent) pg. 4); ***Davis*** **v.** *Richardson,* 342 F. Supp. 588 (D. Conn. 1972) (3 judge court), *aff'd mem,* 409 U.S. 1069 (1972).

The purpose of 42 U.S.C. § 416(h)(3)(C)(ii) is to insure that a child is dependent and to prevent spurious claims. *See, Jiminez* v. *Weinberger,* 417 U.S. 628, 636 (1974); *Beaty* v. *Weinberger,* 478 F.2d 300, 306 & 308 (5th Cir. 1973), *judgment aff'd mem* 418 U.S. — (1974) 94 S. Ct. 3190; *Norton* v. *Weinberger,* Civil 72-271-B (D. Md., filed Feb. 28, 1975) (3 judge court) (slip op. pg. 9); and *Lucas* v. *Secretary,* Civil No. 4845 (D. R.I., filed Feb. 25, 1975) (slip op. p. 25).

(4)

In a statutory scheme whose purposes are to prevent spurious claims and to insure that a child was dependent on his deceased father at the time of the father's death, there is no question that the requirement that an illegitimate child show that his father was living with him or contributing to his support at the time of his father's death rationally advances the purposes of the statutory scheme. The question is whether this requirement can be justified as a means of rationally advancing these purposes.

Unlike the situation in *Jiminez* v. *Weinberger,* 417 U.S. 628 (1974), or other Supreme Court cases in which some illegitimates were totally excluded from the benefits available to legitimates or other illegitimates; *New Jersey Welfare Rights Organization* v. *Cahill,* 411 U.S. 619 (1973)

(per curiam); *Gomez* v. *Perez*, 409 U.S. 535 (1973) (per curiam); *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972); *Glona* v. *American Guarantee & Liability Insurance Co. et al.*, 391 U.S. 73 (1968); and *Levy* v. *Louisiana*, 391 U.S. 68 (1968); the statute in this case, 42 U.S.C. § 416(h)(3)(C)(ii), does not exclude any applicant from the opportunity to demonstrate that he is a dependent child. The question is, therefore, whether it is rational to require an illegitimate child to show dependency when dependency is conclusively presumed for legitimates; and for illegitimates who qualify under any of the three exceptions, wedding ceremony impediment, court order, or written acknowledgment.

Experience alone would lead to the conclusion that an illegitimate child for whom there is no court support or paternity order, written acknowledgment, or good faith ceremony, is less likely to be dependent upon his father than a legitimate child.[12] But experience need not be the sole source for this proposition. Two courts have accepted the same conclusion. In *Severence* v. *Weinberger*, 362 F. Supp. 1348 (D.D.C. 1973) (3 judge court), the Court said:

> "The second allegedly rational basis proferred by the Defendants is the argument that . . . Congress is justified in presuming that legitimate children are more likely to be dependent than illegitimate children and therefore justified in imposing conditions of proof on illegitimates claiming benefits. . . . [T]he Court has no difficulty with this proposition . . . The premise would surely justify the imposition of appropriate conditions requiring proof of dependency . . .".

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[12] The statistics show that illegitimacy is growing. The rate grew from 7.1 births per 1000 unmarried women in 1940 to 26.4 per 1000 in 1970. Statistical Abstract of the United States 56 (1974); 24 U. Miami L. Rev. 813 (1970). One in ten children is born illegitimate. Statistical Abstract of the United States 56 (1974). Krause: Equal Protection for the Illegitimate, 65 Mich. L. Rev. 477 (1967).

362 F. Supp. at 1354. *See, also, Watts* v. *Veneman,* 476 F.2d 529 (D.D.C. 1973) (3 judge ct.) (per curiam).

And in the recent case of *Beaty* v. *Weinberger,* 478 F.2d 300 (5th Cir. 1973), *judgment aff'd mem,* 418 U.S. —, 94 S. Ct. 3190 (1974), the Fifth Circuit said:

> "We do not here dispute the Secretary's underlying premise that because illegitimate children are less likely to be supported by their fathers than h(2) [42 U.S.C. § 416(h)(2)] children—a proposition which we are inclined to accept as true—the former might be required to establish to the satisfaction of the Secretary the entitling facts of . . . support. Thus it would doubtless be appropriate for Congress to require that post-disability illegitimate children prove those facts." 478 F.2d at 306.
>
> ". . . [P]roof of . . . support may be required of post-disability, illegitimate children . . ." 478 F.2d at 308.

The Supreme Court has accepted as rational the requirement that certain illegitimates prove their dependency. In *Jiminez* v. *Weinberger,* 417 U.S. 628 (1974), the Supreme Court struck down a Social Security child's benefit scheme which denied to illegitimate children "any opportunity to prove dependency in order to establish their 'claim' to support and, hence, their right to eligibility as 'children' of the claimant under the Social Security Act." 417 U.S. at 637-638.

In *Weber* v. *Aetna Casualty & Surety Co. et al.,* 406 U.S. 164 (1973), the Supreme Court in finding unconstitutional a workmen's compensation scheme that could totally exclude a dependent unacknowledged illegitimate child, stressed that the Court was not affecting the requirement of proof of dependency. 406 U.S. at 174-175.

No help can be obtained by reference to other federal statutes as "The cases deciding the reference point for and the meaning of 'child' or 'children' within the terms of a federal statute are in hopeless confusion." *Metropolitan Life Insurance Company* v. *Thompson,* 250 F. Supp. 476, 477 (E.D. Pa. 1966). *See,* The Rights of Illegitimates Under Federal Statutes, 76 Harv. L. Rev. 337 (1962).

The statutory scheme is over inclusive in that some of the legitimates, and some of the illegitimates, who are presumed to be dependent may in fact not be dependent upon their father. *Jiminez* v. *Weinberger,* 417 U.S. 628, 636-637 (1974). The statute is not under inclusive, however, as each applicant has an opportunity to demonstrate his dependency. *Lucas* v. *Secretary,* Civil No. 4845 (D. R.I., filed Feb. 25, 1975) (slip. op. pg. 22). The only applicant who will not receive child's dependency benefits is a child who is not dependent.

It is not a violation of the due process clause if the classifications made by federal laws are imperfect. It is enough that the government's action be rational and free from invidious discrimination. *See, Wisdom* v. *Norton,* 507 F.2d 750, 758, and 758 n. 3 (2d Cir. 1974).

Thus, a statutory scheme that requires a deceased wage earner's illegitimate child, who does not come within the three exceptions for illegitimates, to demonstrate dependency by showing his father was living with him or contributing to his support at the time of the father's death, is a rational means to achieve the legitimate legislative ends of insuring that a child applicant is dependent on the deceased father and preventing spurious claims. As the statutory requirement for proof of dependency can be justified as a means of rationally advancing this purpose, the statute is not violative of due process, and is constitutional. The recent case of *Norton* v. *Weinberger,* as discussed *infra,* fully supports that conclusion.

The applicant in *Norton* v. *Weinberger*, 364 F. Supp. 1117 (D. Md. 1973) (3 judge court), *vacated and remanded*, 418 U.S. — (1974), 94 S. Ct. 3190, had been found by an Administrative Law Judge to be the son of an insured wage earner, but the Administrative Law Judge held that the father was not living with or contributing to the support of his son at the time of the father's death.

The facts as set out in the single judge court's initial review of the administrative action show that the Norton child had been born to unmarried high school students. The father never lived with the mother or the child. When the child was born the father contributed $6.00 and some gifts of clothing and other baby things. The father never undertook to support the child. The father was an unemployed student. While serving in Viet Nam, the father tried to start a military allotment for the child but he failed to complete the procedures before he was killed. *Norton* v. *Richardson*, 352 F. Supp. 596, 599-600 (D. Md. 1972).

The subsequent three judge court held constitutional the requirement of 42 U.S.C. § 416(h)(3)(C)(ii) that an illegitimate child who did not come within one of the statutory conclusive presumptions as to dependency must show that his father was living with him or contributing to his support at the time of the father's death. The Norton child was denied Social Security child's insurance benefits because he could not make such a showing of dependency. *Norton* v. *Weinberger*, 364 F. Supp. 1117 (D. Md. 1973) (3 judge ct.).

On June 24, 1974 at 418 U.S. — (1974), 94 S. Ct. 3190, the Supreme Court vacated the judgment of the three judge court in *Norton* and remanded the case to the District Court for further consideration in light of *Jiminez* v. *Weinberger*, 417 U.S. 628 (1974).

In *Jiminez,* two illegitimates whose eligible father became disabled before they were born were of a subclass that was absolutely barred from Social Security children's benefits because neither child's paternity had been acknowledged or affirmed through evidence of domicile and support before the onset of their father's disability. 417 U.S. at 631.

42 U.S.C. § 416(h)(3)(B) denied these children any opportunity to prove dependency in order to establish their right to eligibility. 417 U.S. at 635.

The Supreme Court held that:

> "to conclusively deny one subclass [the two Jiminez children] benefits presumptively available to the other denies the former the equal protection of the law guaranteed by the due process provision of the Fifth Amendment." 417 U.S. at 637.

But—the Supreme Court did not order benefits paid to the two illegitimate children.

The Supreme Court remanded the case to permit the two illegitimates "an opportunity consistent with this opinion, to establish their claim to eligibility as 'children' of the claimant under the Social Security Act". 417 U.S. at 637-638.

Thus the Supreme Court did not object to a requirement that illegitimates establish their claims as "children" under the Social Security Act. The Supreme Court objected only to a statutory total bar on an opportunity for illegitimates to establish their claims.

On the same day that the Supreme Court vacated and remanded *Norton,* it affirmed (*mem*) the judgment in ***Beaty***

v. *Weinberger*, 478 F.2d 300 (5th Cir. 1973), 418 U.S. — (1974), 94 S. Ct. 3190, which had held that 42 U.S.C. § 416(h)(3)(B)(ii) was unconstitutional insofar as it totally excluded claims by a subclass of illegitimate children, some of whose claims would be demonstrably valid. 478 F.2d at 308 (the class totally excluded was made up of illegitimates who were born after the onset of their natural father's disability).

The Fifth Circuit had stressed, however, that it is appropriate for Congress to require these illegitimate children to prove the fact of parentage and support. 478 F.2d at 306, 307 and 308.

Thus, by its action on June 24, 1974, the Supreme Court was saying that insofar as a Social Security statute totally excludes illegitimates it is unconstitutional, but insofar as it requires illegitimates to prove parentage and dependency it is constitutional.

The Supreme Court did not reverse *Norton* v. *Weinberger*, which it could have done had 42 U.S.C. § 416(h)(3)(c)(ii) been unconstitutional as applied. Nor did the Supreme Court affirm, which it could have done had it agreed with the opinion of the three judge court. Thus, the question,—what caused the remand when in *Jiminez* and *Beaty* the Supreme Court agreed that proof of dependency was a valid statutory requirement?

The answer to the why of the remand is found in the conflict of the logic between *Jiminez* and *Norton* as to the purpose of the "Social Security scheme".

Norton was decided by the three judge court in the District of Maryland on the premise that the Social Security scheme was

> "designed, not to provide support a child never had, but to replace support lost on the death of the wage earner upon whom the child depended". 361 F. Supp. at 1129.

In *Jiminez*, the Supreme Court rejected this premise as to a disabled wage earner, saying

> "We do not read the statute as supporting that view of its purpose." 417 U.S. at 634.

The Supreme Court said that

> "the primary purpose of the contested Social Security scheme is to provide support for dependents of a disabled wage earner". 417 U.S. at 634.

This same purpose would apply in this *Adams* case, substituting "dead wage earner" for "disabled wage earner". This different expression of purpose of the Social Security scheme does not make any change in this *Adams* case, however. As the Secretary acknowledges that the deceased insured wage earner was the father of the Adams child, the law still requires that it be shown that he was either living with the child or contributing to his support when he died.

On remand, the three judge *Norton* court of the District of Maryland split two to one. The majority found that the primary purpose of the statutory scheme was to aid dependent children. They found that the Norton child "never was dependent" (slip op. pg. 9), that "Congress never intended to aid Norton's class of nondependents" (slip op. pg. 9), and that "in the context of survivor's benefits, only nondependents will fail to recover" (slip. op. pg. 9). Refusing to characterize illegitimacy as a "suspect" classification (slip op. pg. 7), the *Norton* majority found that "the statutory scheme of classification and presumptions was substantially and rationally related to the Act's purpose to

aid dependent children of deceased wage earners" (slip op. pg. 11).[13]

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

April 17, 1975

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[13] The dissenting judge would hold unconstitutional that portion of 42 U.S.C. § 416(h)(3)(C)(ii) which requires proof that the father was living with or contributing to the support of the applicant at the time the insured individual died, because this requirement results in invidious unequal treatment. *Norton* v. *Weinberger, supra,* (slip op. pp. 10, 12).

In *Lucas* v. *Secretary* Civil Action No. 4845 (D.R.I., filed, Feb. 25, 1975), the single judge court ordered benefits paid to claimants born during an 18 year union between the deceased wage earner and their mother (slip op. pg. 32 n. 9 and pg. 33 n. 10) for the reason that it is not a legitimate governmental interest to condition eligibility on the basis "that legitimate and 'legitimated' children are more entitled to support by or through a parent than are illegitimate children." (slip op. pg. 24).

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STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 17th day of April 19 75 he served ~~a copy~~ two copies of the within

Brief for Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Professor Oscar G. Chase
c/o Brooklyn Law School
~~250~~ Joralemon Street
Brooklyn, N. Y. 11201

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

17th day of April 19 75

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977